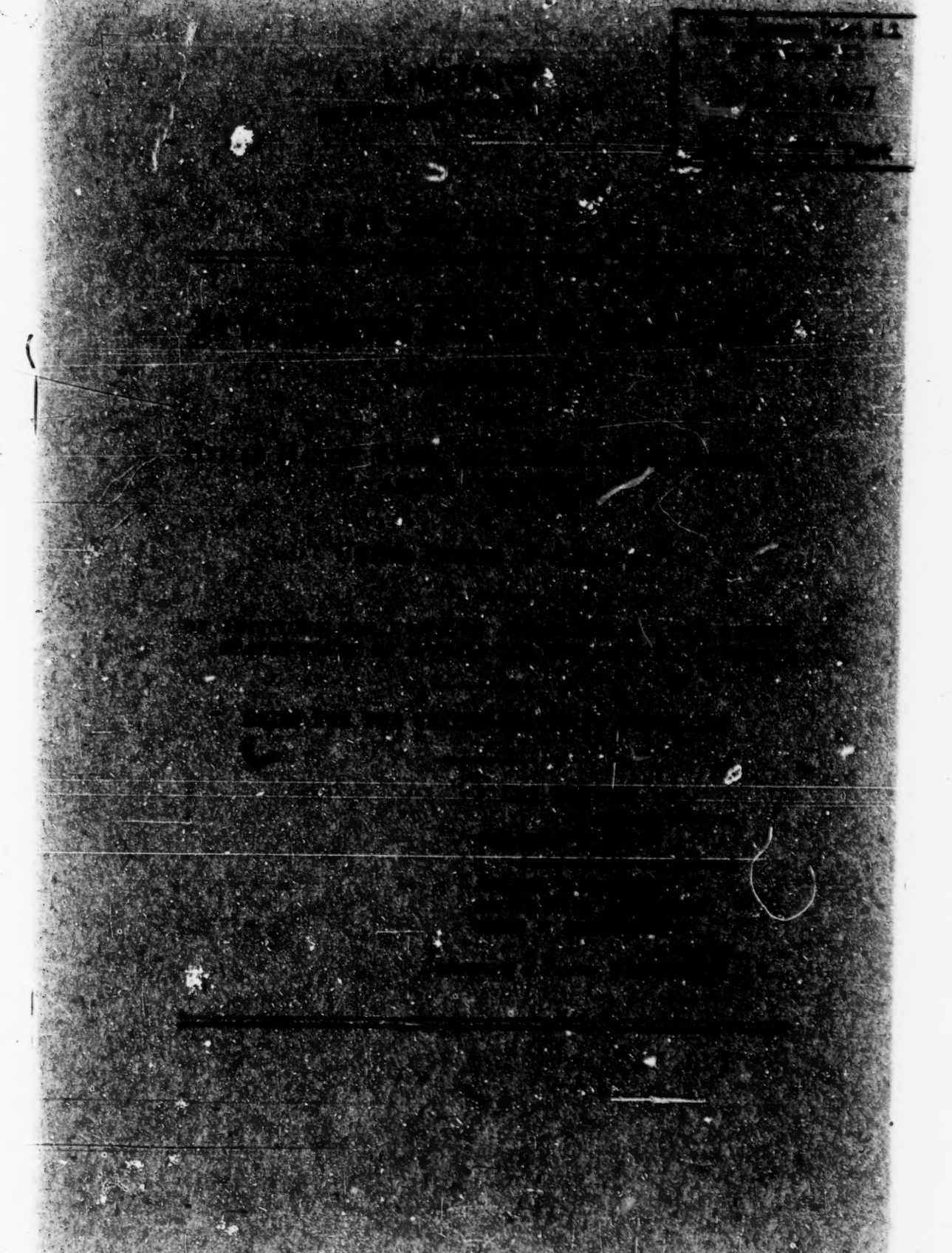

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In the Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 592, 593 and 594

HYMAN HARVEY KLEIN, MAURICE HAAS AND MORRIS O. ALPRIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. K. A1–A23; Pet. H. A1–A23; Pet. A. 3a–27a) [1] is reported at 247 F. 2d 908.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1957, and petitions for rehearing were denied on October 3, 1957. (Pet. K. A24–A26.) The petitions for writs of certiorari were filed on November 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

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[1] Klein's petition for a writ of certiorari is designated "Pet. K."; Haas's, "Pet. H."; and Alprin's, "Pet. A.".

QUESTIONS PRESENTED[2]

1. Whether petitioners could properly be convicted of a conspiracy to defraud the Government by obstructing the Treasury Department in its collection of income taxes, in the absence of proof that there were taxes due.

2. Whether the evidence warranted the conclusion, reached by the jury under appropriate instructions, that petitioners were members of a single, overall conspiracy rather than merely of several separate subsidiary conspiracies.

3. Whether there was a prejudicial variance between indictment and proof because the "collection" of income taxes does not include the determination of the amount of taxes owed nor the taxpayers against whom they are to be assessed.

4. Whether it was prejudicial error to admit in evidence against petitioner Klein statements made to Treasury officials by Koerner and Roer during, and in furtherance of, the conspiracy.

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[2] The following table shows the order in which the questions discussed here are presented in the petitions of Klein, Haas and Alprin:

Questions	*Klein*	*Haas*	*Alprin*
1	4		
2	1, 2		4
3		4	
4	3		
5		3	
6	6		
7		6	3
8	5	5	2
9	7	1	
10		2	1

5. Whether prosecution was barred by the three-year statute of limitations.

6. Whether, by electing to proceed with the trial after acquittal had been directed on the first four counts and the evidence relevant to those counts stricken, petitioner Klein waived any prejudice which might have resulted from continuing the trial on the remaining fifth count.

7. Whether the jury instructions as to petitioner Alprin's income tax returns and as to petitioner Haas' role as an accountant and tax attorney were sufficient.

8. Whether the granting of petitioners' motions for judgment of acquittal on the first four counts of the indictment barred their conviction on the fifth count under the doctrines of double jeopardy or *res judicata*.

9. Whether the trial court applied the proper standard as to quantum of proof upon the motion for acquittal at the close of the Government's case.

10. Whether the indictment should have been dismissed on the ground that the privilege against self-incrimination of Alprin and Haas was violated when, having been subpoenaed to appear before the grand jury, they testified freely and did not invoke the privilege.

STATUTE INVOLVED

18 U. S. C. 371. Conspiracy To Commit Offense or To Defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose,

and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

Petitioners stood trial on two consolidated indictments containing a total of five counts. The first three counts charged attempted evasion of the petitioner Hyman Harvey Klein's income taxes for the years 1944, 1945 and 1946. The fourth count charged a conspiracy to evade the income taxes of the petitioner Klein and his three Canadian business associates for the same period. Motions for judgment of acquittal on these four counts were granted at the close of the Government's case. (R. 25–36, 137–145, 149, 790–800.)

The remaining count (the fifth in the original indictment (R. 33–36) and the second in the superseding indictment (R. 142–145)), charged an unlawful conspiracy from on or about June 1, 1946, to the date of indictment, September 17, 1954, "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, incomes taxes". This count went on to specify in five separate paragraphs the methods which were used, charging, *inter alia,* the concealment of the nature of defendants' business activities and the

source and nature of their income, the misreporting of income, and the making of false entries in books of account. (R. 143–144.) A verdict of guilty having been returned on this count, the petitioner Klein was sentenced to four years in prison and fined $8,000; the petitioner Alprin was sentenced to three years in prison and fined $6,000; the petitioner Haas was sentenced to two years in prison and fined $4,000. (R. 2652.) The Court of Appeals unanimously affirmed the convictions. (Pet. K. A1–A23.)

1. *The Conspirators.* Seven defendants and three co-conspirators were named in the fifth count. The petitioner Hyman Harvey Klein was a United States citizen, the alleged evasion of whose income taxes for the years 1944, 1945 and 1946 was involved in the first four counts. Tremendous amounts of money were made during the period when OPA was in effect in this country by selling "Harwood's", a brand of whiskey manufactured in Canada by a wholly owned subsidiary of a Canadian corporation of which Klein's three Canadian associates—his brother, Isidor J. Klein, Albert McLennan and George Norgan—were officers and directors.* Although these three Canadian associates were also named as defendants, they were never apprehended and did not appear at the trial. The remaining defendants were the petitioner Alprin and Ellis Rosenberg (who died before trial), attorneys who aided the petitioner Klein in distrib-

* According to the Government's bill of particulars, the gross receipts and income of Klein and his three Canadian associates from sales of Canadian whiskey in the United States during the period 1944–1946 were over $39,000,000 and $21,000,000, respectively. (R. 125–127.)

uting Harwood's in this country, and petitioner Haas, an accountant and attorney who later became a member of the conspiracy.

Irving A. Koerner, named as a co-conspirator, was an OPA official and the manager of the New York City wholesale division of R. C. Williams & Company, which became the syndicate's distributor for Harwood's in the United States.[4] William Rokoff, a co-conspirator, was petitioner Klein's personal secretary and ran Klein's office in Baltimore.[5]

2. *The Corporate Organization.* Prior to the start of the conspiracy, the petitioner Klein and his three Canadian associates employed the other named persons to assist them in operating an immense whiskey-selling business in a fashion calculated to minimize the amount of United States income taxes they would have to pay.

On paper the whiskey appeared to pass through the hands of several intermediate parties between the Canadian manufacturer and the local United States distributors. Initially the whiskey was billed f. o. b. Canada at $8.05 per case to Agencias Destiladoras, a Cuban corporation of which the petitioner Klein and his three Canadian associates owned all of the stock in equal shares.[6] Agencias then billed the whiskey

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[4] Albert Roer, a defendant and co-conspirator in the first four counts, but not named in the last, was very active in selling Harwood's in this country. (R. 1526.)

[5] Harry Silver, the remaining co-conspirator, is not presently involved.

[6] Klein had received legal tax advice warning him to avoid passage of title in the United States. (Govt. Exs. Vol., pp. 69a–77a).

f. o. b. Canada at $19.05 per case to R. C. Williams & Company, the New York importer. R. C. Williams & Company was authorized to bill the whiskey to local United States distributors approved by Agencias at an additional mark-up of $1.60 per case, 60¢ of which was required to be paid to salesmen approved by Klein. (R. 600, 1579–1581; Govt. Exs. Vol., pp. 33a, 44a, 49a–67a, 91a 93a, 95a, 8–18; Pet. Exs. Vol., pp. 497–539.) Actually, the petitioner Klein determined the local United States distributors to whom the whiskey would be allocated by R. C. Williams & Company, and the Canadian corporation shipped the whiskey directly to such designated distributors. No whiskey ever went to or from Cuba and the bookkeeping and invoicing for Agencias was handled in Baltimore, Maryland, under Klein's guidance and by his secretary Rokoff. (R. 183–184, 209, 453, 596, 600, 1577, 1579–1580, 1587–1591; Govt. Exs. Vol., pp. 49a–66a, 8–15.)

Before any whiskey was shipped from Canada, in April 1944,[7] the petitioner Klein and his legal adviser, petitioner Alprin, had, with the help of Koerner, negotiated with the president and chief counsel of R. C. Williams & Company on a distribution contract for Harwood's whiskey. After considering the tax situation (R. 1564–1565, 2140–2141), Klein and Alprin had decided that the contract with R. C. Williams &

[7] The application for an OPA price order on Harwood's whiskey was filed on behalf of R. C. Williams & Company, Koerner's employer, on February 18, 1944. (Govt. Exs. Vol., p. 1a.) Koerner was an OPA consultant at the time. (R. 1556.)

Company should be broken into two contracts (R. 175–176, 207; Govt. Exs. Vol., pp. 5a–13a, 33a–34a). The first, a "contract-in-chief" on behalf of Agencias and R. C. Williams & Company, set out the terms on which R. C. Williams & Company would distribute Harwood's whiskey for Agencias (Govt. Exs. Vol., pp. 24a-32a). The second was a subsidiary and secret "contract of control and activity" (Govt. Exs. Vol., pp. 33a–34a). The latter gave Agencias complete control of the choice of local distributors for Harwood's whiskey and of the payment of commissions to salesmen of its choosing.

With the passage of time, the elaborate plan of billing for Harwood's and other Canadian whiskeys became further complicated. In early 1945 Klein and his three Canadian associates organized new Panamanian and Cuban corporations. The Canadian corporation began billing whiskeys to Panamanian corporations f. o. b. Canada. It no longer billed Agencias. The Panamanian corporations then billed Agencias f. o. b. Canada which billed R. C. Williams & Company f. o. b. Canada. In 1946 Klein did away with the two-year-old Agencias. A new Cuban corporation was substituted in the billing process for Agencias. Other new Panamanian and Cuban corporations were fitted into the billing scheme for oth Canadian whiskeys. (Govt. Exs. Vol., pp. 68a, 78a–81a, 17–19.) In both 1945 and 1946 the system became more complex. The Cuban and Panamanian corporations which were billing and being billed were organized as subsidiaries of Cuban and Panamania: holding corporations. Some of these, in turn, were made the

subsidiaries of other Cuban and Panamanian holding corporations. The contours of the profit-taking were made even harder to discern by bookkeeping entries under which some of the Cuban and Panamanian corporations paid "royalties", "expenses", and the like, to each other (R. 600, 1602; Govt. Exs. Vol., pp. 279–280).

The process of ordering and the actual flow of Harwood's whiskey into the United States remained the same. R. C. Williams & Company ordered directly from the Canadian corporation, which shipped directly to local distributors in the United States. No whiskey ever went to or from Panama or Cuba. The bookkeeping for the Panamanian corporations, as well as the Cuban corporations, was handled in Klein's office in Baltimore by Rokoff under Klein's direction. (R. 183–184, 209, 596, 600, 1577, 1579–1580, 1587–1591; Govt. Exs. Vol., pp. 49a–66a, 8–15.) The paper work needed to effect the sales was also done in Baltimore; letters sent to R. C. Williams & Company for Cuban and Panamanian corporations on corporation letterheads—although bearing fictitious initials of Cuban secretaries—were in fact composed and typed in Baltimore, Maryland (e. g., R. 452–454; Govt. Exs. Vol., pp. 68a, 95a); invoices on the intercorporate sales were also made out in Baltimore, Maryland (R. 183–184; Govt. Exs. Vol., pp. 45a–46a).[8]

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[8] The charges in the first four counts were premised on the theory that the evidence established that the foreign billing corporations were shams; that the whiskey-selling business was a joint venture of Klein and his three Canadian associates; and that the income from such business was accordingly taxable

Meanwhile, in February, 1945, Klein asked Alprin to obtain a tax opinion from Haas. (R. 1573, 2145.) Despite Klein's assertion at the trial that "I wanted to be amply protected that the corporation was not doing business in the United States" (R. 1573), Klein and Alprin sent Haas only the "contract-in-chief" and not the subsidiary "contract of control and activity" (R. 2146–2147). Haas prepared an opinion (addressed to Agencias and sent to both Klein and Alprin) which concluded with the warning that (Govt. Ex. Vol., pp. 263–264):

> if * * * your president is in fact doing your business here, such as supervising the carrying out of your agreement with Williams, supervising the shipment of the merchandise from Harwood to Williams, and caring for the multitude of details which must be involved in these transactions, then you are doing business here and subject to tax here. My opinion is based solely on the facts which have been given me and which I have outlined above.

3. *The Distribution of Profits.* Since the second of the two consolidated indictments upon which the petitioners stood trial was filed on September 17, 1954 (R. 137), the statute of limitations here applicable (18 U. S. C. 3282) requires proof of a conspiracy con-

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to them. The trial court rejected that theory. The rejection of that theory, insofar as it affected the charges in the remaining fifth count, merely meant that the foreign billing corporations, which were not supposed to be engaged in business in the United States, rather than Klein and his three Canadian associates, must be treated as the source of payments made to individuals in the United States.

tinuing after September, 1951.[9] However, since the indictment alleged that the conspiracy began on or about June 1, 1946 (R. 142), we shall first consider events between that time and September 1951.

Among the Panamanian corporations which had been organized in 1945 was Tivoli Trading Company. Tivoli was on paper the only one of those Panamanian corporations which was owned by Klein alone rather than together with his three Canadian associates. (R. 1654–1658, 1754–1755; Govt. Exs. Vol., pp. 343–345; Pets. Exs. Vol., pp. 618–636.) Moreover, unlike the others, Tivoli had no apparent paper function; it was neither a holding company nor a billing company. (R. 646.) Indeed, at the trial the petitioner Klein admitted that Tivoli never conducted any business and labeled Tivoli "sort of a catchall, a depository". (R. 1598–1660.)

In mid-December of 1946, Klein called Haas to Baltimore to prepare a consolidated balance sheet from which he was to compute Klein's final share in the Cuban and Panamanian companies, all of which had stopped functioning by that time (R. 1844), from a set of trial balances prepared by Rokoff (Govt. Ex. Vol., pp. 390–413). On Klein's instructions, Haas kept Tivoli's assets off the balance sheet. (R. 1844,

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[9] The parties seem to have assumed, and the court instructed the jury, that the critical date was September 17, 1951 (R. 2582). However, by the Act of September 1, 1954, c. 1214, § 10 (a), 68 Stat. 1145, 18 U. S. C., Supp. IV, 3282, offenses as to which the existing statute had not run on September 1, 1954, were made subject to the new five year statute. The critical date, therefore, was September 1, 1951. However, on the facts here relied upon the difference in dates is not material.

1898.) At that moment Tivoli held in excess of $3,400,000—consisting entirely of profits from the whiskey sales. (Govt. Exs. Vol., p. 359.) Haas' final consolidated balance sheet showed "accounts receivable" of $1,500,000 due from Tivoli as an asset of Regan Potter Company, one of the principal money holders in the Klein chain of corporations. (R. 1846, 1898–1899, Govt. Ex. Vol., p. 275.) But later Haas' original work sheets were destroyed at a time when he admittedly knew that Klein ventures were under investigation by the Treasury Department (R. 1899–1903). The Rokoff balance sheets, from which Haas worked, and the discarded original Regan Potter book treated this $1,500,000 as "commissions paid" to Tivoli. (R. 529, 590; cf. Govt. Ex. Vol., p. 275.) The original Regan Potter book disappeared in Montreal, Canada, in March of 1947 along with the original Tivoli book of account after Rokoff rewrote both of them under Klein's directions, just before the rewritten books and all the rest of the syndicate's books were given to the Canadians. (R. 515–530, 564.) The Tivoli and Regan Potter Company books, as rewritten in March, 1947, contained entries which recorded a "repayment" to Regan Potter by Tivoli of the $1,500,000 by the transfer of United States Certificates of Indebtedness purchased on Klein's order in February, 1947. (Govt. Ex. Vol., pp. 163–168, 301–302, 353–354, 309.) On April 3, 1947, about one week after Rokoff asserted the Regan Potter records were sent to Klein's three Canadian associates in Montreal (R. 564–565), a final entry was made in those records in the New York office of petitioner Haas (R. 601–615; Govt. Ex.

Vol., p. 302), at a time when Klein was using Haas' New York office (R. 603, 1456). That entry was a journal note made by Haas' typist at Haas' instruction. It stated merely "commissions paid" in the amount of $1,500,000, but to whom it was paid there is no telling. (R. 601–603, 607–611; Govt. Ex. Vol., p. 302.)

In June of 1946, following the pattern of Klein's Tivoli, there were organized 13 additional Cuban corporations which were to serve as corporate pocketbooks for Klein's associates. Rosenberg received one of these corporations, and Koerner, Roer and Alprin, four apiece. Later Roer transferred one of his corporations—La Ribera—to Haas. (R. 1909–1912, 2091–2093, 2095–2098, 2241, 2245; Pets. Exs. Vol., pp. 672–677.) Alprin testified that Klein instructed him to form these corporations; that he spoke with Haas about their creation; and Klein assigned Rosenberg to work out the details. (R. 341, 2091–2093, 2095–2096.) None of these Cuban corporations ever did any business. (R. 624–625, 632; Pets. Exs. Vol., pp. 672–677.)

Notwithstanding the fact that Tivoli never actually carried on any business in which it could incur expenses, and notwithstanding the fact that the Cuban corporations—as distinguished from their stockholders—never performed any services which would have entitled them to remuneration, Klein in February and March of 1947 caused Tivoli to make substantial payments to those corporations and had Rokoff record the payments in Tivoli's books as "Commissions and Expenses" paid to those corporations. (R. 1598, 1600; Govt. Exs. Vol., pp. 354–355.) Thus, Tivoli

drew a check in favor of Rosenberg's corporation in the amount of $55,000 and a check in favor of Haas' LaRibera corporation in the amount of $35,000. At about the same time, Tivoli funds were used to purchase two Canadian bank drafts, made out in favor of one of Alprin's corporations, in equal amounts totaling $528,325.40, and a third Canadian bank draft, made out in favor of one of Roer's corporations, in the amount of $272,423.62. (R. 2241; Govt. Exs. Vol., pp. 196–200, 205, 354–355.) Moreover, for a considerable period, during which Klein's income taxes were the subject of investigation, the facts about these payments were concealed. (R. 1713–1715.) Klein instructed Haas to deposit his $35,000 check in a Canadian bank[10] and not to use it until further notice. (R. 1851–1852.) Klein delivered Roer's draft to him with similar instructions about non-use. (R. 365.) Klein gave Alprin the two identical drafts totaling $528,325.40, explaining that one was for Alprin and one for Koerner, and that Alprin should deposit his own in a Canadian bank and hold onto Koerner's. (R. 2110–2111.) On the same day on

[10] The transfer of assets and records to Canada had begun at an earlier date. In September 1946, upon learning from the New York agent of the Royal Bank of Canada that the Government wanted to see the accounts and records of the Harwood corporations, Klein had the bank agent immediately transfer over $8,000,000 worth of bonds to Canada. (R. 413–415, 2264–2267; Govt. Exs. Vol., pp. 35–38, 41–44, 49–52.) Later, in June and July of 1947, when the Internal Revenue Service issued a summons to the New York agency of the bank to produce the accounts and records of some of the Cuban corporations, those records were not to be found in the United States. (R. 1429, Pets. Exs. Vol., pp. 608–617.)

which the three Canadian bank drafts were purchased, Klein closed out Tivoli's account by transferring more than $1,000,000 to Hannes & Company, another completely inactive Panamanian corporation wholly owned by Klein.[11] (R. 1518, 1598–1599, 1808–1809; Govt. Exs. Vol., pp. 67–68, 251, 357.) Haas deposited his check in Canada. (R. 1852, 1913.) Roer held his draft and did not deposit it until 1950. (R. 376; Govt. Exs. Vol., pp. 423–424.) Alprin split up his draft into three parts and deposited them in three Canadian bank accounts in the names of three of his Cuban corporations to be held until further notice. On Klein's instructions, Alprin held Koerner's draft in a vault despite Koerner's desperate efforts to obtain it. Finally to appease Koerner who still wanted his draft, an escrow arrangement was worked out whereby Haas, his partner and two lawyers for Koerner held Koerner's draft in escrow in a safe deposit box. In February, 1949, Klein instructed Alprin to reassemble his funds into a new draft and to hold on to it. Alprin did so and put the new draft in a vault. On the same day on which Alprin reassembled his draft, Klein used $800,000 of Hannes' funds to purchase Canadian bank drafts which he held, just as the Alprin, Koerner and Roer drafts were being held. These Hannes funds have never been accounted for. (R. 1921, 1928–1929,

[11] When Klein was asked in cross-examination why Tivoli could not have served the same purpose as Hannes, he answered (R. 1809): "Maybe I like the name Hannes, sir".

2009–2011, 2028–2030, 2111, 2124–2125, 2177–2179, 2202, 2208, 2231–2232, 2261; Govt. Exs. Vol., pp. 83, 95, 101–112.)

In 1949 the Treasury Department submitted a series of interrogatories to petitioner Klein, and petitioner Haas helped him with the answers. (R. 1920.) Klein falsely stated that he was "not in a position to answer" questions about the nature and amount of funds paid over by Tivoli to the Cuban corporations controlled by Haas, Alprin and Roer, or to identify the beneficial owners of such corporations. (R. 1713–1715.) Klein also stated that all the books of account of his foreign corporations were maintained at the corporations' Cuban office, although he knew that the chief set of books had been kept by his secretary Rokoff in Baltimore. (R. 518–519, 590–593, 1587–1591, 1598, 1619–1623.) About this time, Klein told Haas that in negotiations with the Treasury Department he was trying to treat the Cuban corporations as part of his own system and to pay a capital gains tax on them. Under Klein's plan, Alprin, Koerner and Roer would have reimbursed him for the taxes. (R. 1930–1931.)

4. *Activities After September 1951.* On November 3, 1951, Klein signed the interrogatories which he had submitted to Treasury officials in 1949, leaving his false answers unchanged and swearing to the truth of what he had said. (R. 1711–1712.)

In February, 1952, the Tivoli drafts of both Alprin and Koerner, totaling $528,325.40, were still being secreted in safe deposit boxes. On February 29, 1952, Klein and Alprin had a telephone conver-

sation in which Klein told Alprin that he could then use his own draft and release Koerner's. In authorizing release of the drafts, Klein cautioned Alprin to get a good tax man and suggested he should do nothing until he had seen Rosenberg. (R. 2125–2126, 2183, 2204–2205.)

In their income tax returns for 1952, filed in March, 1953, Alprin and Koerner each reported the amount of their drafts as capital gains on the "sale" of Tivoli stock in March of 1952. (Govt. Exs. Vol., pp. 7, 220.) In his income tax return for 1950, Roer had reported the amount of his draft as a capital gain on the "sale" of Tivoli stock in March of 1950. (Govt. Exs. Vol., pp. 242, 244.)

Between September and December of 1952, Klein, Haas, Alprin, Koerner and Roer all testified before Treasury officials. Alprin and Roer said that the Tivoli drafts paid to their Cuban corporations were liquidating dividends and were not commissions. (R. 301, 308–309, 365.) Koerner said that the second Tivoli draft paid to Alprin's corporation was a liquidating dividend earmarked for him (Koerner) and was not for commissions (R. 231–235). Haas admitted he knew that Klein had refused to disclose the true recipients of the Tivoli drafts (R. 508) and admitted he had concurred in omitting the amount of Alprin's draft from Alprin's federal income tax returns during the long period of hiding (R. 488, 490, 491–492, 498–500). During that entire period Haas had prepared the federal income tax returns for both Klein and Alprin. (R. 489, 1876–1879.) Before the Treasury officials, Klein denied that the amounts paid

to the Cuban corporations by Tivoli represented "commissions" to them, despite the entries in the Tivoli journal (R. 655–656; Govt. Exs. Vol., pp. 354–355), and claimed instead that they were really a bonus or gift to the individuals for a job well done (R. 653, 654–655, 661). Klein also denied that the payment to Haas' Cuban corporation was a commission or for services rendered by Haas, despite the entries in Tivoli's books. (R. 658.) At trial, however, Klein testified that the payment was in anticipation of accounting services to be rendered by Haas. (R. 1534.)

In the overall picture—notwithstanding the variations in treatment of the Tivoli payments by those who received them—the use of Tivoli as payor and the Cuban corporations as payees served the common purpose of concealing the true source and nature of the income from the whiskey selling business. This, together with all of the other evidence—establishing concerted activity in (1) rewriting and falsifying books, (2) the flight of assets and business records to Canada, (3) the destruction of original records of account, (4) the late misreporting of ordinary income, (5) the concealment of substantial amounts for five years, and (6) the false swearing to Treasury officers—all went to prove the conspiracy charged and its one overall objective of deceiving the Treasury Department and impeding its efforts to perform its most vital function, the collection of the revenue.

ARGUMENT

1. Petitioner Klein argues (Pet. K. 21–23) that he could not properly be convicted of a conspiracy

to defraud the Government by obstructing the collection of the revenue, because it was not proved that additional taxes were due. It is apparent, however, that the phrase "collection of the revenue" used in the indictment was not confined to the function of collecting monies known to be due, but embraced the necessary preliminary steps of ascertaining what tax, if any, was due, and the assessment thereof. (*Infra*, pp. 28–29.) The proof in this case showed studied and concerted action by the conspirators over a period of years to conceal from the United States Treasury Department the nature of their business relationships and activities and the source and nature of the income of themselves and their corporations, i. e., to conceal facts having a vital bearing on the question of what additional taxes, if any, were due from those entities. (*Supra*, pp. 6–16.) When millions of dollars of profits are earned by the distribution in this country of whiskey ostensibly sold by a complex syndicate of foreign corporations partly owned by American citizens, and when other American citizens perform substantial services in the United States on behalf of those corporations over a period of years, clearly the United States Treasury Department has the right to inquire into what income tax liability may have been incurred by those corporations and individuals. It has the further right to make that inquiry free from the interference of unlawful conspiracies designed to impair, impede and defeat it. The relevant inquiry here is whether there was such a conspiracy,

not how many dollars of unreported taxes are due.[12]

The devices to deceive the tax authorities were a fraud within the meaning of Section 371 of Title 18. *Schino* v. *United States*, 209 F. 2d 67 (C. A. 9), certiorari denied, 347 U. S. 937; *Kobey* v. *United States*, 208 F. 2d 583 (C. A. 9); *Benator* v. *United States*, 209 F. 2d 734 (C. A. 9), certiorari denied, 347 U. S. 974; Cf. *Glasser* v. *United States*, 315 U. S. 60, 64, 66. That statute is "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas* v. *Henkel*, 216 U. S. 462, 479. It is necessary only that the obstruction is intended to be accomplished "by deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt* v. *United States*, 265 U. S. 182, 188. The words "in any manner or for any purpose" are "most comprehensive, and show that the intention of the lawmaking power was to have the statute as broad and as comprehensive as it could possibly be." See *McGregor* v. *United States*, 134 Fed. 187, 195 (C. A. 4). It is well settled that in order to make a case under this section the Government need not show an actual financial or property loss. *Haas* v. *Henkel*, *supra*, pp. 479–480 and cases cited; *Hammerschmidt* v. *United States*, *supra*, p. 188; cf. *Curley* v. *United States*, 130 Fed. 1, 11 (C. A. 1st), certiorari denied, 195 U. S. 628. And of course it is the con-

[12] Due to the obstructive efforts of the conspiracy the Government still does not know—eleven years after the termination of [illegible] whiskey sales—just how much is owing in unreported taxes.

spiracy itself which is the offense, without reference to whether its object is attained. *Williamson* v. *United States*, 207 U. S. 425, 447.

Applying these principles to the instant case, petitioners' conviction did not depend on proof that additional taxes were owing. This was not a charge of wilfully attempting to evade taxes, but of unlawfully conspiring to obstruct the Treasury Department in the exercise of an essential function, the collection of the revenue. The proof of that charge showed carefully planned and long-continued concealment, craft, trickery, and misrepresentation (*supra*, pp. 6–18), all designed to impede and defeat the attempts of Treasury officials to ascertain which individuals and corporations owed federal income taxes on the Harwood profits, and in what amounts. The conduct shown here comes well within the language and the meaning of the conspiracy statute.[11]

2. Petitioners Klein (Pet. K. 10–18) and Alprin (Pet. A. 35–40) contend that there was a fatal variance in that the indictment alleged only one conspiracy and the proof showed three conspiracies. A subsidiary contention by Klein is that the case was submitted to the jury on alternate theories and that he may have been convicted on a theory not charged in the indictment, not proved against him and barred by limita-

[11] There is no merit in the suggestion (Pet. K. 21, 23) that the decision below "conflicts in principle" with *Pettibone* v. *United States*, 242 F. 2d 620 (C. A. 4). That case distinguishes between attempts to commit a crime which failed because of inherent impossibility and those that failed because of some intervening circumstance. Here, whether or not a tax was in fact due, there was certainly no element of impossibility.

tions as to him. (Pet. K. 10–13.) These arguments are without merit. The indictment charged, and the verdict (in the light of the judge's charge) found that the activities described in the Statement, *supra*, were pursuant to one general scheme. The evidence fully supports that conclusion.

In almost every conspiracy case it is possible to argue, from a fragmentation of the evidence, that several subsidiary conspiracies have been proved. But this type of subdivision is not required where there is evidence from which the jury could reasonably conclude that the various subplots are bound together to accomplish a common aim. *Blumenthal* v. *United States*, 332 U. S. 539; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Witt*, 215 F. 2d 580, 583 (C. A. 2), certiorari denied, 348 U. S. 887. Where, as here, the evidence supports the inference of a single conspiracy and the judge charges the jury that it must find that conspiracy or none at all, the conviction stands, no matter how many other crimes could have been proved by the same evidence. *United States* v. *Manton*, 107 F. 2d 834, 838 (C. A. 2), certiorari denied, 309 U. S. 664; *United States* v. *Weinberg*, 226 F. 2d 161, 171 (C. A. 3), certiorari denied, 350 U. S. 933; cf. *Wyatt* v. *United States*, 23 F. 2d 791, 792 (C. A. 3), certiorari denied, 277 U. S. 588. The type of case in which a variance is fatally prejudicial is where there is insufficient evidence to establish the one conspiracy charged in the indictment, and the only proof is of separate conspiracies not alleged. *E. g.*, *Kotteakos* v. *United States*, 328 U. S. 750, the case upon which petitioners place primary reliance. (Pet.

K. 17, 18; Pet. A. 37–38). Compare ***Blumenthal*** **v.** ***United States,*** 332 U. S. 539, 556–559.

The proof in this case showed, as the indictment charged, one conspiracy. From the facts we have detailed (*supra,* pp. 11–18), the jury was plainly entitled to infer that Klein's Tivoli Trading Co. and the Cuban corporations, organized at Klein's request, were never anything more than devices used for the sole purpose of concealing and misleading; that the petitioners used them to prevent the Internal Revenue Service from learning that substantial payments had been made to them and others in 1947 for services rendered in the United States to corporations owned by Klein and his Canadian associates which were not supposed to be doing business in the United States; that knowledge of such payments would have resulted in the imposition of income taxes on the immense whiskey profits realized by Klein and his associates; that in order to prevent the vital fact of these payments from coming to the attention of the taxing authorities the conspirators, under Klein's leadership, accepted payment in 1947 in the form of bank drafts which were then either hidden in safe deposit boxes or deposited in the Canadian bank accounts of Cuban corporations with Spanish names; that the Tivoli records, like the drafts themselves, did not disclose the names of the individuals; that there was no record of the drafts in the United States; that it was not until March, 1952, i. e., five years after their issuance, that Alprin deposited his draft and Haas released Koerner's draft (each of which was for some $264,-

000) as instructed by Klein; that it was not until the latter part of 1952 that the fact of these payments became known to the Treasury agents; that the concealment was all part of a plan directed by Klein with the full knowledge and aid of Alprin and Haas; and that the aim of their concerted action was to prevent the true nature of the transactions from coming to the attention of those in the Treasury Department responsible for determining how much taxable income was earned by whom in the United States.

This was the conspiracy charged in the indictment, proved by the evidence, and submitted to the jury by the trial judge (R. 2568–2578):[11] a conspiracy to

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[11] In addition to the careful, detailed instructions cited above, the jury was charged generally, *inter alia*, as follows:

> When the Government relies upon circumstantial evidence to establish the conspiracy, as here, the circumstances must be such as to warrant your finding that the alleged conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement and the doing of some overt act to accomplish its object. [R. 2564–2565.]
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> * * * * *
>
> The Government must have proved beyond a reasonable doubt that a defendant was knowingly associated in the unlawful common enterprise; that he participated in it wilfully with intent to further the common purpose or design. [R. 2565.]
>
> * * * * *
>
> You may not find a defendant to have been a conspirator, unless the unlawful acts charged were embraced within the common purposes of which he was aware. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. [R. 2566.]

"defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, income taxes" by means (among others) of "conceal[ing] and continu[ing] to conceal the nature of their business activities and the source and nature of their income" (R. 143); more specifically, by means of causing entries to be made in Tivoli's books "for the purpose of concealing the nature and source of the income received by the defendants herein" (R. 144). It is clear that the evidence established these two "means" alleged in the indictment.[15] It is immaterial that it did not necessarily establish the other "means" there alleged, relating to the reporting of income from Tivoli by Alprin, Koerner and Roer as capital gains, and the jury was so instructed. (R. 2564.)[16] Petitioners' contentions amount to little

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[15] The very fact that Tivoli was used to pay these drafts to Alprin, Koerner and Roer served to conceal the fact that they were being compensated for their activities in the United States on behalf of the Harwood's syndicate. Moreover, the Tivoli books (like the drafts) did not disclose the names of these individuals, but indicated that the "commissions" had gone to "La Economica Agencias, S. A., Havana, Cuba" and "Compania Exportadora Fernandina, S. A. Havana, Cuba." (Govt. Exs. Vol., p. 355.)

[16] After summarizing the inconsistent claim as to the proper treatment of the Tivoli drafts to the June-of-1946 corporations, the court instructed (R. 2575):

> But in spite of which of those inconsistent claims you might find to be true, you could find that the manner of handling the payment of those sums was part of an overall plan by the defendants and co-conspirators to conceal from the United States Treasury Department the facts, whatever they were, so that the true income tax liability, if any, of the defendants might not be ascertained.
>
> You could also find that at the time when the drafts

more than an argument that every "means" alleged in the indictment must be shown to have been used by every one of the conspirators. Cf. *Nye & Nissen* v. *United States*, 336 U. S. 613, 617. The complete answer to the contentions of Klein and Alprin is that regardless of whether the Tivoli drafts were considered as commissions or bonuses for services rendered, as claimed by Klein and Rokoff, or whether they were considered as capital gains on the liquidation of Tivoli (a corporation which never did any business), as claimed by Alprin and Haas, the jury was entitled to conclude that the *hiding* of these funds over a period of years by petitioners, acting in concert, was part of a plan to obstruct the taxing authorities by denying to them vital information which they were entitled to have. As the Court of Appeals pointed out (Pet. K. and Pet. H. A18; Pet. A. 21a), "the income whose source and nature were being concealed was not primarily the drafts, but the Harwood's profits received much earlier by Klein and the three Canadians."

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were delivered to Alprin and Roer they were either a liquidating dividend or compensation or a gift, but with a condition attached. You could find that there was an understanding that they were to be held pending the determination of the tax consequences of the syndicate's operations. It might be found that it was agreed that Alprin, Koerner and Roer were not to receive their liquidating dividend or compensation for services or gift until the tax, if any, to be assessed against Hyman Harvey Klein or his corporations or his three Canadian co-venturers and him, on the income resulting from the whiskey selling venture, was determined. * * *

Klein's primary argument (Pet. K. 10–13) rests on the erroneous belief that "the misbranding of the Tivoli drafts in the Roer, Alprin and Koerner returns was the main objective of the conspiracy * * *." (Pet. K. 12.) In fact, of course, the indictment was much broader. The alleged misbranding of the Tivoli drafts in the tax returns was not an essential part of the crime charged, but only one facet of the alleged means by which the conspiracy was to be furthered. Much more important was the highly secretive manner in which the drafts were handled by the petitioners over a period of years.

Against the background sketched above the contentions by Klein and Alprin that the evidence showed multiple conspiracies are seen to be without substance. The issue framed by the indictment was not whether there was a little "Klein-Rokoff conspiracy to mislabel the Tivoli drafts as commissions on the books of Tivoli" (Pet. K. 16; Pet. A. 35, 36), or a little "Alprin-Roer-Koerner conspiracy to file returns falsely reporting the drafts as capital gains" (Pet. K. 16), but whether the petitioners had unlawfully conspired to defraud the Government by impeding and obstructing the Treasury Department in the collection of taxes resulting from the Harwood business. That broad conspiracy was shown to have continued at least until February 19, 1952 (*infra*, pp. 31–33), no matter what different explanations the conspirators adopted as to whether the drafts were to be treated as commissions or capital gains. We submit that the proof established the single conspiracy alleged in the indictment, and that the trial judge was correct in sub-

mitting the case to the jury for a verdict on that basis.

3. Petitioner Haas contends (Pet. H. 16–23) that there was a fatal variance in that the indictment charged a conspiracy to defraud the Government by obstructing the Treasury Department in the *collection* of income taxes, whereas the proof showed a conspiracy to defraud the Government by obstructing the Treasury Department in its function of *determining the existence* of a tax liability. As petitioner points out (Pet. H. 16), the superseded indictment had described the function as the "assessment and collection of income taxes" (R. 34). It is noteworthy that none of the petitioners evidenced a belief before trial that the language of the new indictment changed the theory of the Government's case, for none of them made any pre-trial motion relating to the new indictment. Haas and Alprin stipulated that their motions addressed to the first indictment, including their motions for bills of particulars, were to be deemed "duly and timely made and determined" with respect to the second indictment (R. 147) and Klein did not even do that. It is apparent, as the trial court recognized (R. 2570),[17] that the function of collecting income taxes necessarily

[17] "Obviously the Treasury Department cannot enforce the collection of income taxes unless it can first ascertain the true business relationship between and among persons and corporations engaged in income producing activity so that any tax liability can be determined and verified. If the facts which determine their legal relationship and the source and nature of their income are concealed or kept under cover by deceit, trickery or dishonest means, then it follows that the Treasury Department's lawful functions in the collection of income taxes have been subject to efforts designed to impede, impair, obstruct and defeat those functions." (R. 2570.)

includes the functions of ascertaining the amount of the tax, and assessing the tax. Whatever doubt the opening paragraph of the count might have raised was certainly dispelled by the five succeeding paragraphs, each of which refers, in some form of language, to "concealing the nature and source of the income received by the defendants herein." (R. 143–144.) Clearly, this could not refer to the mere mechanical process of collecting a tax, but went to the Treasury Department's function of ascertaining its amount.[18]

Assuming, *arguendo*, that there was a variance, it was plainly unprejudicial. Cf. *Berger* v. *United States*, 295 U. S. 78, 82. It is plain that petitioners were not taken by surprise at the trial. As the Court of Appeals stated (Pets. K. and H. A16, A22; Pet. A. 19a, 25a):

> Before [petitioners] testified in late July and August at a trial beginning in April and after a five weeks' gap in presentation of evidence to the jury while the parties were deciding upon the evidence to be preserved after the excision of the four counts, they knew the prosecution's case quite thoroughly. And of course they

[18] The argument that Collectors of Internal Revenue, as distinguished from the Treasury Department, are charged with collection of taxes would, if true, point up at most solely a technical defect in the indictment. In fact it weighs against petitioners' argument that "collection" is to be taken in a technical sense as the enforcement of a tax liability otherwise established. However, there is not even a technical fault in the indictment in this respect. Under 5 U. S. C. 242, the Secretary of the Treasury "shall superintend the collection of the revenue * * *."

> knew the detail of facts better than the prosecution could hope to know them. * * *
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> * * * there is no possibility that [Haas] was at all misled by the allegation. * * *

4. Petitioner Klein complains (Pet. K. 18–21) that it was error to admit in evidence against him certain statements made by Koerner and Roer to Treasury officials in the fall of 1952 with reference to their holding the Tivoli drafts and treating them as capital gains.[19] The petitioner has consistently presented the issue on the admissibility of these statements in terms of whether they were introduced as false or true. (R. 1167–1168; Pet. K. 19.) The real issue, however, is whether these statements could be considered as made in aid of the conspiracy, in which case, whether true or false, they were admissible against all of the conspirators. *Lutwak* v. *United States*, 344 U. S. 604; *Krulewitch* v. *United States*, 336 U. S. 440; *Fiswick* v. *United States*, 329 U. S. 211; *Clune* v. *United States*, 159 U. S. 590. Since the burden of these statements aided in establishing the secreting of these drafts over a period of years and an explanation of their origin which would serve to conceal operations on behalf of the Klein corporations within

[19] At the time the statements were admitted, both Roer and Koerner were defendants on trial under the first counts of the indictment. At that time the statements were therefore clearly admissible against them. When the first counts were dismissed, the question arose as to how much of the record should be retained against the remaining defendants. If error occurred, it was at this time or at the time of the Government's summation. (Pet. K. 20.)

the United States, they had a direct bearing on the furtherance of the conspiracy.

Petitioner complains, however, that portions of the statements, later referred to by the government, were not in furtherance of the conspiracy and were highly prejudicial to Klein's position at the trial. However, the trial court specifically limited any use that the jury could make of the statements to those parts which they should find were in advancement of the common cause (R. 2567). In spite of the possibilities of confusion resulting from the dismissal of the first counts, it must be assumed that the jury followed the court's instructions. As this Court stated in *Opper* v. *United States*, 348 U. S. 84 at 95:

> To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. * * *

5. Petitioner Haas contends (Pet. H. 11-16) that prosecution for the conspiracy alleged in the fifth count was barred by the three-year statute of limitations. The indictment charged a conspiracy beginning about June 1, 1946, and continuing to the date of the indictment, September 17, 1954. The jury was instructed that they could convict only if they found a conspiracy to have existed and an overt act to have been committed after September 17, 1951 (R. 2582).[20] The

[20] If this was error and the date should have been September 1, 1951 (see fn. 9, p. 11, *supra*), the error was in petitioners' favor.

Court of Appeals listed ten overt acts committed after that date, pointing out that "some of these are alternatives", depending upon which set of witnesses was telling the truth as to whether the Tivoli drafts constituted capital gain or ordinary income. (Pet. K. A12.) Two of these were specifically mentioned in the indictment. Cf. *United States* v. *Negro,* 164 F. 2d 168, 172 (C. A. 2d). Another consisted of Klein's signing, in November, 1951, of interrogatories put to him earlier by Treasury officials. Klein swore to the truth of what he had said, including two major falsehoods (*supra,*) p. 16). In addition there was the telephone conversation of February 29, 1952, pleaded as an overt act (R. 144), wherein Klein told Alprin (1) that he could use his draft and release Koerner's, (2) that he should get a "good tax man", and (3) that he should do nothing "until Monday, when Mr. Rosenberg will come to see you" (Pet. K. A8). This conversation alone would be sufficient to remove any limitations question from this case, for there was proof of a pleaded overt act and proof of a continuing conspiracy, submitted to the jury under proper instructions. *Brown* v. *Elliott,* 225 U. S. 392, 401 and cases cited. It is unnecessary that the overt act, taken by itself, be criminal in character. *Braverman* v. *United States,* 317 U. S. 49, 53. "The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work' * * *" *Yates* v. *United States,* 354 U. S. 298, 334. Here this overt act showed clearly that, at least until February 29, 1952, the conspirators were continuing their efforts to obstruct the Treasury Department by hiding the

crucial Tivoli drafts. There was no new, subsidiary conspiracy to hide the past (the issue in *Grunewald* v. *United States*, 353 U. S. 391) nor had the central criminal purpose of the conspiracy been finally accomplished.[21]

6. Petitioner Klein contends (Pet. K. 25–26) that the evidence which was stricken by the court following judgment of acquittal on the first four counts was "irremediably prejudicial" and hence rendered impossible a fair trial on the remaining count with the result that he was deprived of due process of law. This contention is without substance.

The stricken evidence was not improperly received in the first instance, and no claim is made that it was. The evidence was competent and relevant at least as

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[21] Haas also contends (Pet. H. 12–14) that the fifth count conspiracy, on which petitioners were convicted, was no more than a conspiracy to conceal the tax evasion crimes alleged to have been committed in the first four counts. But it is apparent that a conspiracy to obstruct the taxing authorities in their efforts to collect the revenue is quite distinct from a substantive tax evasion crime, and from a conspiracy to commit such an offense. (*Supra*, p. 21.) Equally without merit is the suggestion (Pet. H. 15) that the proof to support the conspiracy charge is identical with that to support a misdemeanor conviction under Section 145 (a) of the Internal Revenue Code of 1939 for failing to supply information. There is a vast difference between acts of commission and mere acts of omission. *Spies* v. *United States*, 317 U. S. 492, 498–499. In the instant case the jury was instructed that the Government was not claiming mere acts of omission, but "the defendants are charged with affirmative conduct wilfully and knowingly designed and executed with an evil motive and purpose, namely, to so arrange their affairs and their records and to file income tax returns and to so demean themselves as to deceive and delude the tax authorities when and if the authorities should seek to ascertain and verify the liability for income taxation of the defendants." (R. 2571.)

to the first four counts and it was admitted, for the most part, without objection and without restriction as to counts. The evidence was stricken on petitioners' motions since in the trial court's view it lacked probative value as to the remaining count. (R. 810–1226.) After securing the ruling, petitioners did not move for a mistrial even though the trial judge in effect invited such a motion by declaring that he doubted that the impact of the evidence could be eliminated (R. 837). After motions for acquittal on the fifth count were denied (R. 1240–1241), the petitioners did not object to proceeding with the trial. At the court's suggestion and with the approval of the parties, the court prepared and read to the jury a summary of the retained evidence. Petitioner conceded in his brief in the Court of Appeals (p. 95) that the trial judge "did this in a way that pays tribute to his fairness". In short, petitioner's contention boils down to a lament that the course which he elected to pursue at the trial has proved unprofitable. As was observed by this Court in *Johnson* v. *United States*, 318 U. S. 189, 201:

> We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped

> to chart and in which he acquiesced until the case was argued on appeal. * * *

The authorities relied upon by petitioner are not in point.

7. Petitioners Alprin and Haas contend that their defense was prejudiced by the trial court's refusal to give certain requested instructions. Petitioner Alprin's complaint (Pet. A. 27–35) is that the court refused to instruct the jury as to the factual situation which would have justified him in delaying his return on the receipt of the Tivoli draft (Pet. A. 27–28). According to Alprin (Pet. A. 29) "a key issue in the case was whether it was lawful for [him] to fail to report his draft, or the proceeds thereof, as income until 1972," in view of the "restriction" imposed by Klein on its use. The answer to this is that there was no basis in the evidence for the requested instructions since under Alprin's theory of defense there could have been no restrictions imposed by Klein on his use of the draft. It was Alprin's position throughout that the draft which was a bearer instrument represented a liquidating dividend from Tivoli. If so, he had the unqualified right to its use and disposition and Klein was in no position to impose restrictions on its use. Hence, if as he contended, the draft represented a liquidating dividend, his failure to report receipt of the dividend and the manner in which he handled the draft were indicative not of "restrictions" imposed by Klein, but of a mutual agreement and concert of action. Furthermore, the argument made here mistakes the issue. The issue framed by the pleadings and proof was not when

Alprin should have reported the income represented by his draft, for petitioners were not charged with a conspiracy to evade Alprin's taxes for any year, but rather, as the jury was instructed (R. 2575), whether "the manner of handling the payment of those sums was part of an overall plan * * * to conceal from the * * * Treasury Department the facts, whatever they were, so that the true income tax liability, if any, of the defendants *might not be ascertained*." (Emphasis added.)

Haas argues (Pet. H. 29–30) that he was "held in this case" because of the accounting and legal services which he rendered and that he was prejudiced by the trial court's refusal to instruct the jury, as requested, on his "obligations and rights in connection with his normal function as an accountant and tax attorney." This argument ignores the record. The jury was instructed, among other things, that (R. 2585):

> * * * if you find that the defendant Haas * * * only performed professional services to the other named alleged co-conspirators, he could not thereby become a member of a conspiracy by merely the rendition of such professional services even assuming that such a conspiracy existed.

8. All three petitioners advance the argument (Pet. A. 16–27; Pet. H. 23–28; Pet. K. 24–25), in one form or another, that (Pet. A. 16) "under principles of double jeopardy" or "*res judicata*", their conviction on the fifth count was barred by the directed acquittal on the fourth. They argue that the conspiracy

charged in the fifth count was not a separate conspiracy but a part of the larger conspiracy charged in the fourth count and that when acquittal was directed on the fourth count, charging the larger conspiracy, the lesser one fell with it. Whatever view be taken of the scope of the counts the bar of double jeopardy is not applicable here, there being but one trial. As the court below pointed out (Pet. K. App. 21) "it is clear that there is no double jeopardy from differing dispositions of counts of a single indictment at a single trial. The prosecution may allege the same charge in different counts with the protection that only a single penalty is permitted." See *Dunn* v. *United States*, 284 U. S. 390; *Dealy* v. *United States*, 152 U. S. 539; *Barsock* v. *United States*, 177 F. 2d 141 (C. A. 9th); *Corbin* v. *United States*, 205 Fed. 278 (C. A. 8th). As the court below also noted (Pet. K. App. 21), although the trial judge "spoke in terms of acquittal", his ruling on the first four counts "was no different than had he awaited the conclusion of the trial and then declined to submit the particular count to the jury for lack of proof.".

Insofar as *res judicata* is concerned, we have pointed out above, *supra*, p. 21, the obviously different scope of the two charges. An acquittal can conclude the Government only as to matters which were in issue on the counts involved. *Sealfon* v. *United States*, 332 U. S. 575, 578. Here acquittal on the first counts implied no finding which would require acquittal on the remaining count.

9. Petitioners Klein (Pet. K. 26–28) and Haas (Pet. H. 4–8) argue that in ruling on their motions

for acquittal at the close of the Government's case, the trial court employed an incorrect standard of proof (R. 718–719). They urge that the Second Circuit has erred for many years in holding that the standard of proof necessary to take a case to the jury is the same in criminal as in civil cases, *United States* v. *Feinberg*, 140 F. 2d 592, 594, certiorari denied, 322 U. S. 726; *United States* v. *Costello*, 221 F. 2d 668, 680, affirmed on other points, 350 U. S. 359; *United States* v. *Masiello*, 235 F. 2d 279, certiorari denied, 352 U. S. 882; and contend that the proper test is whether the trial judge believes that the evidence is sufficient to establish guilt beyond a reasonable doubt.[22] Petitioners cite a number of cases from other circuits in which courts have used language differing from that used in the Second Circuit. But these differences in formulation leave no doubt of the point which is dispositive under this Court's decisions—that the question as to whether a reasonable doubt exists is for the jury, and that on appeal the proper test is whether there was competent and substantial evidence fairly tending to sustain the verdict. *Pierce* v. *United States*, 252 U. S. 239, 251; *Glasser* v. *United States*, 315 U. S. 60, 80; *Abrams* v. *United States*, 250

[22] The gist of the holdings in the Second Circuit is aptly summarized in *United States* v. *Feinberg*, *supra*, where the court said that appellate courts should refuse to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy them beyond a reasonable doubt: "While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use." (140 F. 2d at 594.)

U. S. 616; *Gorin* v. *United States*, 312 U. S. 19, 32; *Mortensen* v. *United States*, 322 U. S. 369, 374. It follows that the trial court did not err in testing the sufficiency of the evidence as follows: "Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence, if a reasonable person might conclude guilt therefrom the motion for judgment of acquittal must fall." (R. 717.)

10 Petitioners Alprin (Pet. A. 9–16) and Haas[23] (Pet. H. 8–10) contend that their right under the Fifth Amendment not to be compelled to testify against themselves was violated and that the indictment should have been dismissed as against them because, although "prospective defendants", they were compelled to give incriminating testimony before the grand jury which later returned the indictment. This contention is also without merit.

While it is true that, at the time of petitioners' appearance, the grand jury was considering matters

[23] Petitioner Haas emphasizes in his argument the alleged failure to advise him of his Constitutional right not to testify, relying on *United States* v. *Scully*, 225 F. 2d 113 (C. A. 2), certiorari denied, 350 U. S. 897. This is an inappropriate case to raise the issue of the necessity of such a warning since the record shows that counsel for the petitioners had two conferences with the assistant United States Attorney just prior to their appearance at which the position of his clients was explored. The substance of these conversations was related to the petitioners. R. 66–7, 102–104. Thus if the issue of the necessity of a warning is here at all, it is here only in the technical sense of whether particular words must be addressed to the witness at the time of his appearance.

which might, and later did, lead to their indictment, the petitioners were well aware of this fact and of their right to decline to answer any question which might tend to incriminate them. As the court below pointed out (Pet. K. App. 23), petitioners, themselves lawyers of training and experience, were represented prior to their indictment, as well as later, by resourceful counsel. Their counsel had been informed by the prosecutor, and petitioners knew well in advance of their appearance, that the grand jury was investigating the whiskey transactions in which they played so intimate a part and that their indictment was a distinct possibility. (R. 67, 103–104.) Forewarned, they chose to testify before the grand jury freely and without claim of privilege—albeit their appearance was in response to subpoena—undoubtedly in the hope of warding off an indictment. If petitioners desired the protection of the privilege against self-incrimination, they were required to claim it, otherwise the privilege is deemed waived. *Rogers* v. *United States*, 340 U. S. 367, 370–371. Having failed to claim the privilege and elected to testify, petitioners cannot now be heard to complain, particularly in the absence of any showing of prejudice whatsoever. Compare, *Grunewald* v. *United States*, 353 U. S. 391.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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